

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**DIXIE L. LUNA**

Claimant

VS.

**SOUTHWESTERN BELL TELEPHONE**

Respondent

Self-Insured

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Docket No. 176,868

**ORDER**

Claimant requests review of the Award of Administrative Law Judge John D. Clark entered in this proceeding on February 24, 1995. The Appeals Board heard oral argument in Wichita, Kansas on July 6, 1995.

**APPEARANCES**

Claimant appeared by her attorney, Elizabeth McBeth of Wichita, Kansas. The respondent appeared by its attorney, Curtis M. Irby of Wichita, Kansas. There were no other appearances.

**RECORD**

The record considered by the Appeals Board is enumerated in the Award of the Administrative Law Judge.

**STIPULATIONS**

The Stipulations of the parties are listed in the Award of the Administrative Law Judge and are adopted by the Appeals Board for this review.

**ISSUES**

The Administrative Law Judge applied the presumption of no work disability found in K.S.A. 1991 Supp. 44-510e and awarded claimant permanent partial disability benefits for a ten percent (10%) functional impairment. Claimant requested the Appeals Board to review that finding. Nature and extent of disability is the sole issue now before the Appeals Board.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record, the Appeals Board finds as follows:

For the reasons expressed below, the Award of the Administrative Law Judge should be affirmed.

Claimant has worked for the respondent for approximately twenty-seven (27) years. Several years ago, while working as a service representative for the respondent, claimant began to experience pain and other symptoms in her hands and arms. Claimant was diagnosed as having carpal tunnel syndrome and underwent treatment from Tyrone Artz, M.D., who performed bilateral carpal tunnel release surgery. Later, claimant came under treatment from J. Mark Melhorn, M.D., who re-operated on both of claimant's arms after having diagnosed bilateral carpal tunnel syndrome, ulnar nerve compression at the wrist, and de Quervain's.

After recuperating from her more recent surgeries, claimant returned to work for respondent at a comparable wage and to her former job and duties. Because claimant has been reprimanded for missing time from work for reasons not related to her work-related injuries, claimant contends she has overcome the presumption of no work disability contained in K.S.A. 1991 Supp. 44-510e and is entitled work disability for these injuries.

The Appeals Board disagrees with claimant's arguments. The Appeals Board finds claimant has returned to a position with respondent within her restrictions earning a comparable wage and the presumption of no work disability contained in K.S.A. 1991 Supp. 44-510e is applicable. The statute provides:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation except in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence. There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

The Appeals Board finds the presumption of no work disability has not been overcome and claimant is entitled to benefits based upon her functional impairment. No evidence has been presented that indicates claimant cannot indefinitely continue to work for respondent and earn a comparable wage, or that the job provided is merely temporary in nature.

Claimant bears the burden of proof to establish her claim. "Burden of proof" is defined in K.S.A. 44-508(g) as ". . . the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record." The burden of proof is:

". . . on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record." K.S.A. 44-501(a).

The Appeals Board adopts the findings and conclusions of the Administrative Law Judge set forth in the Award that are not inconsistent with the specific findings made herein.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated February 24, 1995, should be, and hereby is, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of July 1995.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Elizabeth McBeth, Wichita, Kansas  
Curtis M. Irby, Wichita, Kansas  
John D. Clark, Administrative Law Judge  
David A. Shufelt, Acting Director